A-1 King Size Sandwiches, Inc. *and* Hotel, Motel, Restaurant Employees & Bartenders Union, Local 737. Case 12-CA-9872

December 12, 1982

DECISION AND ORDER

BY FANNING, JENKINS, AND ZIMMERMAN

On August 18, 1982, Administrative Law Judge Michael O. Miller issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, A-1 King Size Sandwiches, Inc., Orlando, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice marked "Appendix B" is substituted for that of the Administrative Law Judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with Hotel, Motel, Restaurant Employees & Bartenders Union, Local 737, as the exclusive bargaining representative of our employees in the unit described below:

All employees employed as sandwich production workers, salad production workers, maintenance, custodial, sanitary workers, pie shop workers, shuttle drivers and shipping helpers; but excluding office clerical employees, all other truckdrivers, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them in Section 7 of the Act.

WE WILL, upon request, bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with the above Union as the exclusive representative of our employees in the appropriate bargaining unit as stated above, and embody any understanding reached in a signed agreement.

A-1 KING SIZE SANDWICHES, INC.

DECISION

STATEMENT OF THE CASE

MICHAEL O. MILLER, Administrative Law Judge: This case was heard in Orlando, Florida, on March 31 and April 1, 1982, based upon an unfair labor practice charge filed by Hotel, Motel, Restaurant Employees & Bartenders Union, Local 737, herein called the Union, on October 13, 1981,[1] and a complaint and notice of hearing issued by the Regional Director of Region 12 of the National Labor Relations Board, herein called the Board, on November 24. The complaint, as amended at the hearing, alleges that A-1 King Size Sandwiches, Inc., herein called Respondent or A-1, violated Section 8(a)(5) and (1) of the Act by engaging in surface bargaining "with the intent to frustrate the bargaining process and require the Union to abdicate its representational rights and duties." Respondent's timely filed answer denies the substantive allegations of the complaint.

All parties were afforded full opportunity to appear, to examine and to cross-examine witnesses, and to argue orally. The General Counsel and Respondent have filed briefs which have been carefully considered.

Based upon the entire record, including my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

I. RESPONDENT'S BUSINESS AND THE UNION'S LABOR ORGANIZATION STATUS—PRELIMINARY CONCLUSIONS OF LAW

Respondent is a corporation engaged at Orlando, Florida, in the business of manufacturing, distributing, and selling prepared foods such as sandwiches and pies. Jurisdiction is not in dispute. The complaint alleges, Respondent admits, and I find and conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

[1] All dates hereinafter are 1981, unless otherwise specified.

The complaint alleges, Respondent admits, and I find and conclude that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Background—The Factual Setting*

At a Board-supervised representation election conducted among Respondent's production and maintenance employees[2] on April 26, 1979, a majority voted in favor of union representation.[3] Following disposition of Respondent's objections to the election, the Union was certified as the exclusive representative of the employees in the appropriate unit. Respondent challenged that certification by refusing to bargain. A charge was filed (Case 12–CA–8770), a complaint issued on August 31, 1979, and, on January 3, 1980, the Board granted the General Counsel's motion for Summary Judgment (247 NLRB 69). The Board's order was enforced by the United States Court of Appeals for the Fifth Circuit on December 5, 1980.[4] This is Respondent's first experience in dealing with a collective-bargaining representative.

On December 16, Respondent advised the Union that it would commence bargaining upon the Union's proper request.[5] Respondent and the Union met for preliminary conversations on December 23, 1980, and, by mutual agreement, negotiations began on January 12. Harvey Totzke, the Union's business representative (and now is secretary-treasurer) was its principal spokesman. On two occasions the Union was represented in negotiations by an attorney. Employees also attended the bargaining meetings. Charles Robinson Fawsett, Respondent's attorney, an experienced specialist in labor law and its advisor for labor relations matters, was Respondent's chief negotiator, and Roy B. Eby, Respondent's executive vice president, attended the sessions. There were 18 bargaining meetings between January 12 and November 3; the parties did not meet thereafter prior to the hearing herein.

The collective-bargaining meetings lasted approximately 2 hours each. There is no contention that Respondent failed to meet at reasonable times and places. Neither are there any contentions that Respondent bore animus toward the Union[6] or that Respondent engaged in any conduct away from the bargaining table such as might evidence the intention not to conclude an agreement with the Union. The General Counsel's case is premised almost entirely upon the proposals Respondent made or failed to make in the negotiations.

In their preliminary meeting, Totzke and Fawsett agreed that whenever they reached agreement on a bargaining proposal each would initial it. Their testimony and the records in evidence establish that agreement was reached on the following: a recognition clause, plant visitation by union representatives, rights and duties of union stewards, qualifications and benefits for employees on jury duty, the Union's use of a bulletin board, procedures for the processing of grievances and arbitrations, and leaves of absences.

In light of the nature of the General Counsel's allegations and the mannar in which the case was presented and briefed, discussion of the bargaining will proceed herein on an issue-by-issue, rather than on a chronological, basis.

B. *The Bargaining*

1. Management rights

A proposal dealing with management rights was initially presented by Respondent in the third bargaining session, January 22. Pursuant to that proposal, management would have been entitled to make unilateral decisions, not subject to the grievance procedure, in such areas as the scheduling of work time and hours, the subcontracting of work, the assignment of work to employees outside the unit, the transfer of work to or from other facilities, the determination as to the "number, types and grades of positions of employees assigned to a unit, department or project," the establishment and change of work schedules and assignments, the selection, hiring, transferring, promotion, demotion, layoff, termination, suspension, discharge or other discipline of employees, the use of supervisors or other nonunit employees to perform unit work, the alteration, discontinuance, or variance of past practices, and the institution of technological changes. The Union's objections went generally to the length of management's proposal and to what it deemed to be objectionable language affecting job security. In particular, objections were raised to the language dealing with subcontracting, the transfer of work, and the performance of bargaining unit work by supervisors. Fawsett defended Respondent's position, contending that these were rights the Company believed it needed to have.

At the February 5 meeting, the Union presented a counterproposal on work by supervisors. It provided that supervisors would not perform work normally performed by unit employees except in emergencies, to give instruction and training on an experimental basis, to test materials and production for the startup or closedown of operations, or to protect company property and insure employee safety. Respondent rejected this proposal on February 18; Fawsett explained that in Respondent's plant supervisors worked along with the employees doing production and maintenance work with the additional responsibilities of insuring continued machine operation, preventing production slowdowns, and prohibiting horseplay. He explained that Respondent did not

---

[2] The appropriate collective-bargaining unit was and is:

All employees employed as sandwich production workers, salad production workers, maintenance, custodial, sanitary workers, pie shop workers, shuttle drivers and shipping helpers; but excluding office clerical employees, all other truckdrivers, guards and supervisors as defined in the Act.

[3] The tally was 32 for, and 19 against, the petitioner; there was 1 challenged ballot. Respondent presently employs between 50 and 60 unit employees.

[4] Judgment corrected by Order dated January 31, 1981. The court's orders are unpublished.

[5] That letter further set forth Respondent's intentions with regard to wage increases, discussed *infra*.

[6] Respondent's exercise of its legal prerogative to test certification does not evidence such animus. See *Wright Motors, Inc.*, 237 NLRB 570 (1978), enfd. 603 F.2d 604 (7th Cir. 1979).

"feel that it could afford to pay a supervisor to stand around and watch somebody put mayonnaise on bread and cheese on the mayonnaise and a slice of ham on the cheese, etc. It would have been an expense to the company that it could not afford."

On February 27, the Union proposed the following abbreviated management-rights clause:

> The Employer may continue and, from time to time, change such rules and regulations as it may deem necessary and proper for the conduct of its business, provided, however, that the same are not inconsistent with any of the provisions of this Agreement. All such rules and regulations shall be observed by the employees.

This proposal was rejected out of hand, with Fawsett stating that it was worthless to management and would do the Employer no good.

On March 6, the Union proposed new language on subcontracting and management's rights. Its subcontracting proposals would have precluded the employer from subcontracting in order to evade the obligations of its collective-bargaining agreement but would have permitted subcontracting in order to maintain manufacturer's warranties, where the subcontracting would not result in terminations or layoffs of qualified employees, where the employees lacked the skllls or the Company did not possess the equipment to perform the work, or where completion of work with company personnel and equipment was "impractical or uneconomical." The Union's management-rights proposal expanded upon its earlier rejected proposal. It provided for the exclusive retention of all management's "normal and inherent rights with respect to the management of the business," and included within those rights the selection and direction of employees assigned to any classification of work, the subcontracting of work, the establishment and change of work schedules and assignments, the layoffs, termination, or other release of employees from duty "for lack of work or other just cause," the establishment and enforcement of "rules for personal grooming and the maintenance of discipline," decision with regard to the discontinuance of operation in whole or in part, the institution of technological changes, and "such measures as management may determine to be necessary to the orderly, efficient, and economical operation of the business, all except as expressly and clearly limited by the terms of this agreement." Fawsett told the Union that its proposal was still not broad enough and left many important areas in doubt. At some point he explained that the Company was considering, or might wish to consider, the subcontracting of maintenance work and certain aspects of shipping.

On July 12, Fawsett drew Totzke's attention to the language in Respondent's original management-rights proposal which excluded all decisions in the areas covered by the management-rights clause from the grievance procedure. Totzke then objected to that provision, which had, apparently, missed his earlier observation.

On July 20, Respondent presented a new management-rights proposal (attached hereto as Appendix A). That proposal, while eliminating the language excluding the exercise of all management rights from the grievance procedure, expanded Respondent's earlier proposal. It retained to the Company "each and every right, power and privilege that it had ever enjoyed, whether exercised or not, except insofar as it has, by express and specific terms of the agreement, agreed to limitations." Included within the reserved rights were the rights to: determine work schedules; assign overtime work; hire; retire; promote; demote; evaluate; suspend; transfer; assign; direct; layoff; recall; reward; reprimand, discharge or otherwise discipline employees; establish and change work rules and regulations; determine the extent to which its work would be performed by unit employees, supervisors, or other nonunit employees, to discontinue, transfer, or assign any or all of its functions; open new facilities and transfer any part of its work thereto; subcontract any part of its work; make and implement timestudies; institute, modify, or terminate any bonus or work incentive plan (see *infra* 12. Wages); alter or vary past practices; "and make rules and regulations for efficiency, safe practices and discipline." In all of the above, the Union would have been required to agree "that the Company may exercise all of the above without advising the Union of any such proposed action, change or modlfication." Neither would the Company have been required to negotiate with the Union over the decisions or their effect on employees. Totzke objected to this proposal and, on September 14, the Union's counsel, Pilacek, accused Respondent of presenting "patently unpalatable" language in order to avoid the reaching of an agreement. Pilacek unsuccessfully proposed that the parties considered swapping off some of the management-rights and no-strike language. Fawsett denied that he was seeking, by Respondent's proposals, to avoid reaching a collective-bargaining agreement and rejected Pilacek's request.

Respondent's position in regard to its management-rights proposal remained unchanged in the September 30 letter from Eby to Totzke, summarizing its positions as of that time. That letter stated, in conclusion, that Respondent had no further proposals but would be willing to meet and consider any further proposals or ideas presented by the Union.

2. The exclusiveness clause

The Union's initial proposal contained language providing that the contract was "the full and complete agreement . . . on all bargainable issues and neither party shall be required, during the term of this Agreement, to negotiate or bargain upon any issue, whether it is covered or is not covered by this Agreement . . . ." with the exception of negotiations for the settlement of grievances and with regard to rates for newly established job classifications. There was, apparently, no discussion of this proposal.

Respondent's initial management-rights proposal, presented about January 22, contained the following language:

> The parties acknowledge that during the negotiations which resulted in this agreement each had the unlimited right and opportunity to make demands

> and proposals with respect to any subject or matter not removed by law from collective bargaining and that the understandings and agreements arrived at by the parties after exercise of such right and opportunity are set forth in the agreement. Therefore, the Company and Union each, for the life of this agreement, voluntarily and unqualifiedly waive the right to bargain, and agree that the other shall not be obliged to bargain collectively with respect to any subject or matter referred to or covered in this agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both parties at the time that they negotiated or signed this agreement.

Totzke objected to this language, suggesting that it was possibly illegally broad. Fawsett advised him to confer with the Union's counsel.

On April 17, Respondent presented a new proposal, specifically entitled "Exclusiveness Clause." That new clause was essentially identical to the above-quoted language except for the concluding portion of its final sentence. The April 17 proposal omitted the language concerning subjects or matters outside the knowledge or contemplation of either party. It substituted the following description as to which bargaining was to be waived:

> . . . any subject or matter referred to or covered in this agreement or any other subject or matter which otherwise would be interpreted under existing law as a mandatory or permissive subject of bargaining.

Totzke rejected this proposal, again expressing concern that agreement would waive union rights to represent unit employees. On April 24, he offered to agree to the Company's proposal if the phrase "existing law as a mandatory or permissive subject of bargaining" was deleted. On several occasions, Fawsett explained that, "once a contract was obtained, the company wanted to preclude bargaining during the term of the agreement except as to matters which any company with a certified union . . . would be required to give prior notice . . . and to bargain about." He said that this language was his attempt to preclude "any and all contact reopeners on subjects either which the parties had agreed on or which the parties could have negotiated and agreed on." He denied that there was any attempt to preclude the Company's obligation to notify the Union and discuss matters that might come up concerning working conditions or employee rights. He disputed the Union's contentions that the provisions were illegal and referred Totzke to the Union's own attorney.

Pilacek objected to Respondent's exclusiveness clause at the meeting of September 14, referring to it as "a straight-jacket." Respondent's letter of September 30 reiterated its belief that the exclusivity or zipper clause was proper and lawful.

3. No-strike clause

On January 22, the third bargaining session, Respondent proposed a no-strike clause. Pursuant to that clause, the Union and the employees would be precluded from engaging in any strike, either primary or sympathy, slowdown, boycott, picketing, or other work interruptions, for any reasons, including but not limited to, alleged or actual unfair labor practices, alleged or actual unfair employment practices under any antidiscrimination law, alleged or actual breaches of the contract, or sympathy for or support of any other employee or any other union or their activities. Violations of the agreement would subject an employee to immediate discharge "without recourse to the grievance procedure."

There was no substantial discussion concerning the proposed no-strike clause; the Union, however, objected to restrictions on its right to strike over unfair labor practices or equal employment opportunity law violations. Respondent expressed the position that, if they were going to have a contract, the Union should agree not to strike for any purpose. In particular, Fawsett stated, alleged violations of law could be handled through the appropriate agencies. Fawsett pointed out that the Union had filed unfair labor practice charges on behalf of three employees during 1979 and 1980, which charges were subsequently withdrawn, and approximately five charges of racial discrimination had been filed by employees with either the Orlando, Florida, Human Relations Department or the Federal Equal Employment Opportunity Commission.[7] All of those charges resulted in determinations of "no merit." Fawsett described the necessity for the uninterrupted work Respondent wanted in exchange for a contract. The Company's product, he said, was prepared daily pursuant to customer orders and had a limited shelf-life. The position of the parties remained unchanged throughout the negotiations. The Union acknowledged that, ultimately, any contract reached would include a no-strike clause, and maintained its objection to a clause which would preclude strikes over violations of law. Pilacek proposed a somewhat more limited no-strke clause on September 14, in general terms, when discussing the possibility of exchanging various proposals for final agreement. No reference to the no-strike clause was contained in Respondent's September 30 letter.

4. Nondiscrimination clause

The Union's initial proposal of January 12 would have precluded discrimination by either party against employees and applicants for employment based upon union membership, race, color, religion, sex, age or national origin. It subsequently added marital status and handicaps to this list and sought a joint pledge of support for affirmative action. Respondent's position here, similar to that expressed in regard to the no-strike clause, was that a contractual nondiscrimination clause was unnecessary because it would merely be restating existing law. Fawsett pointed out that most of Respondent's employees would be within the ambit of the antidiscrimination agencies' authority inasmuch as the work force was made up primarily of women and minorities and repeated the Company's contention that the employees and the Union

[7] In some cases the same individual had filed charges with both state and Federal agencies.

were "trigger happy" about filing discrimination charges. Fawsett stated that he felt that the employees would be inclined to grieve alleged discrimination complaints, that there would be a number of such grievances which would be expensive and time consuming to the employer and said that he was reluctant to have these come within the ambit of the arbitration provision. This was a frequent topic for discussion in the negotiations and Respondent's position remained unchanged throughout.

Respondent's September 30 letter did not allude to the Union's nondiscrimination proposals except to reiterate, with regard to discipline, that since this plant opened in Orlando, Florida, in 1979, there had been "a history of frivolous charges filed by or on behalf of employees with the Orlando Human Relations Department and the National Labor Relations Board" which had cost the Company considerable money and effort. It objected to the removal of discharges and discipline from its "list of prerogatives" and placed in the hands of an arbitrator. "The company," it said, "would be hamstrung and tied down with non-meritorious claims."

5. Discipline and discharge

The Union's January 12 proposal provided:

> It is understood that the Employer has the right to discipline an employee for any just and sufficient cause.

This was rejected on the basis that it would make the Employer's discipline and discharge decisions subject to the grievance and arbitration procedure which Respondent anticipated would ultimately be included in the contract.[8] Fawsett also stated that Respondent had not received complaints from its employees about excessive or harsh discipline. The Union, he said, was seeking to make it an issue for the first time ever. The Union's protestations that it exercised discretion in the filing of grievances were rejected. When the Union repeated that it did not take issue with proper discipline but wanted only to be involved, Fawsett told Totzke that the Union would be informed. He again disputed Totzke's alleged assertion that the Union did not file grievances.

The Union's discharge and discipline proposal was discussed again on March 22. Fawsett's position, that he did not want any of Respondent's decisions in this area subject to the arbitral process, was repeated. When Totzke tried to convince Respondent that its proposal would facilitate management knowledge as to the fairness with which its supervisors were treating employees, General Manager Eby stated that "he had an open door policy and any time an employee felt that he had a problem of that nature . . . they were welcome to come in and tell him about it."

At the 15th and 16th meetings, July 2 and July 20, the Company's position remained unchanged. The Union asked Fawsett to either agree to its proposal or to make a counterproposal of its own. None was ever made. On July 20, Fawsett told the Union that he believed that the management-rights clause, as proposed by Respondent, would permit the processing of a "grieviously wrong discharge, that a discharge for false cause of something of that nature" could be handled as "an implied right" under the grievance and arbitation procedure. The Union, he said, never disputed this contention. Fawsett also pointed out that the language of the intitial management-rights proposal, precluding recourse to the grievance and arbitration procedure in regard to all management rights, had been deleted from the second management-rights clause; he acknowledged that under either clause, discipline and discharge were reservered as management rights. Respondent's position was stated once again at the meeting of September 14 and was reiterated, in some detail, in the September 30 letter. Once again Respondent stated its objection to third party review of its discipline and discharge decisions and repeated its contention that employees had never complained about "arbitrary, unfair or excessive discipline."

6. Seniority in regard to layoff and recall

The Union's July 12 proposal contained the following language regarding layoff and recall:

> In matters of lay-off for lack of work and recalling thereof, seniority based upon classification within departments shall prevail, provided the employee affected shall have the ability to adequately perform the job.

Respondent did not accept the Union's proposal; Fawsett stated that it went "much too far." He disputed Totzke's contention that the refusal was based upon an unwillingness to consider seniority as a basis for layoff and recall, denied that seniority would be given no weight, and argued that the dispute was over whether seniority would be given controlling weight in a layoff or recall situation. According to Fawsett, the Union's proposal would have made seniority the governing factor. When Totzke pointed to the language which provided that the employee had to have the ability to adequately perform the job, Fawsett stated that this would put every lay off into dispute, subject to arbitration.

The Union presented a second seniority proposal on February 5; its effect was similar. Employees with the skills and ability to do the work would be laid off and recalled pursuant to companywide seniority. That proposal was rejected for the reasons stated above. On the same date, Respondent presented a seniority proposal which provided that "Seniority shall not be used for purposes of layoffs and recall, it shall be used for selection of vacation time." The Union rejected this proposal. A separate layoff and recall clause was proposed by Respondent on February 18. It provided, *inter alia*:

> Selection of employees for layoff will be the company's sole discretion. Company-wide seniority will be considered by the company in such selection, but will not be controlling. No selection of an employee for layoff will be the subject of a grievance or of arbitration under this agreement.

* * * * * *

[8] In fact, a grievance and arbitration procedure was agreed to.

> Recall, if any, from layoff shall be at the discretion of the Employer. The Employer need not consider seniority.

This proposal provided for advance notice of layoff to employees "when possible" and notice to the Union of the names of employees laid off.[9] The Union rejected this proposal.

In the course of the discussions on this subject, Fawsett told the Union that the Comapny had never had a layoff. Circumstances giving rise to the need for a layoff, such as the loss of customers, would, acccording to Fawsett, be a major economic disaster, enough of a catastrophe even without having to take its actions to arbitration. At such a time, he said, A-1 would need to retain its best employees without regard to how long they had been employed. This position was repeated in the September 30 letter, as follows:

> Moreover, we believe your concern about layoffs is excessive. The company has never had a layoff. If it did, it would be the result of a catastrophe. In such an event, the company would be compelled to undergo extreme measures, which would include retaining the best possible workforce. If any layoff were necessary, the company would need to keep the persons most productive to the company. This criterion, as you know, is sometimes, but not necessarily coincidental with seniority. Seniority would certainly be a factor to consider in assessing productivity of an employee, but cannot be the controlling factor. The company is not willing in this instance to make it the controlling factor. Similar considerations apply to recall.

7. Medical leaves of absences

The Union's initial proposal provided for leaves of absences, with 1 year of accrued seniority, for individuals on leaves of absences due to illness or pregnancy. Respondent disputed the need to differentiate between such leaves and those leaves of absences required for other personal reasons and did not agree. In the fifth meeting, Respondent proposed the following: "The Company may, at its sole option and discretion on a case by case basis, grant leave of absences to an employee up to 180 days. The duration of any such leave shall be at the company's discretion." By reference to its simultaneously presented seniority provision, accrual of seniority would be limited to 30 days. No separate provision was made for leaves of absences required by pregnancy, illness, or injury.

Respondent had previously granted light work duty to injured or pregnant employees and had permitted employees to return to work at the conclusion of permissive leaves of absence. On February 18, at the sixth meeting, Respondent stated its intention to refuse light duty, to make leaves of absence for pregnant or injured employees mandatory, and said it would no longer assure that an employee on such a leave would be allowed to return.

On March 6, the Union again proposed that employees who were ill, pregnant, injured, or otherwise disabled, be granted appropriate leaves of absences with seniority accruing up to 1 year. This proposal was rejected; the Union's offer to make reinstatement contingent on the ability of the employee to perform the job received no different response. The Company's oral proposal was that an employee might be able to return if a job were available. Respondent's positions, that there would no longer be light duty for pregnant employees and that pregnancy leave would be mandatory, were reiterated.

On May 19, Respondent and the Union agreed to a leave of absence article which provided, *inter alia*, that employees requesting a leave of absence because of illness, job-related injury, or other disability, including pregnancy, would be granted leaves of up to 180 calendar days, during which time their seniority would continue to accrue. Other leaves, similarly for a maximum of 180 days, would be granted at Respondent's sole option and discretion. In either case, the following was provided in regard to reinstatement:

> Reinstatement to employment following any such leave of absence will be conditioned upon verification to the Company's satisfaction of the employee's ability to perform his previously assigned duties in an unrestricted and unlimited fashion, or upon the immediate availability of another position for which the employee, in the Company's sole judgment and discretion, possesses the necessary skills, qualifications and abilities to perform the work and in which the Company wishes to place the individual.

8. Accrued vacation benefits

The Union presented a proposal on vacations at the first meeting. Included therein was language stating: "Employees that leave the company will collect their accrued vacation pay." The Company refused to agree to this. No agreement was reached on the proposed schedule of vacation benefits.

Respondent presented a vacation article on February 27; it contained no language on accrued vacation and was rejected by the Union.

On March 22, the Union proposed to accept Respondent's vacation schedule provided that Respondent pay voluntarily terminated employees, but not those being terminated for serious offenses, for earned but unused vacation. Respondent objected. According to Totzke's uncontradicted testimony, Respondent stated that even employees who left amicably and for good reason, such as to better themselves, were not, in Respondent's opinion, loyal employees entitled to anything.

Respondent acknowledged that its policy had been that employees who had completed a full year of employment prior to termination would be paid for accrued and unused vacation leave upon termination but that no employee quitting in the middle of a year would receive any accrued vacation pay. Respondent denied that it

[9] Fawsett contended that its proposals providing that employees would not lose accrued seniority by reason of being on a leave of absences was an accommodation intended "to meet the Union part way on the disparate views of handling seniority-layoff/recall matters."

threatened to reduce any vacation benefits.[10] No agreement was reached on the payment for accrued vacation benefits.

9. Meals and rest periods

The Company's practice prior to the onset of negotiations was to grant a 1-hour unpaid lunch period (with a sandwich and dessert provided by the employer) and 15-minute paid breaks in the morning and in afternoon (to those employees still working during the afternoon hours).[11] The Union initially proposed a 1-hour paid lunch period (although that was unclear from the lanquaqe of the proposal) and two 10-minute paid breaks. It verbally altered that proposal to maintain the 15-minute rest periods in effect at that time. No agreement was reached.

The Employer's proposal, dated April 17, called for a one-half hour unpaid lunch period, a 15-minute paid break in the morning and a 10-minute paid break in the afternoon for employees still working at 3:30 p.m. The Union rejected this as a reduction of existing benefits.

In discussions concerning the lunch period, Respondent offered to grant a lunch break in accordance with the will of the majority of employees, either one-half hour or 1 hour unpaid. By agreement with the Union, a poll of the employees was conducted. They indicated their preference for a 1-hour lunch period and Respondent amended its proposal accordingly. The Employer's offer of June 11 codified the existing practice. The Union objected, still seeking a paid lunch period.

10. Dues checkoff

The Union's initial proposal provided for Respondent to check off the dues of those employees authorizing same. Respondent rejected that repeatedly; Fawsett said that checkoff was "nothing more than a union security device." There was little discussion thereafter until September 14 when Pilacek asked Fawsett why Respondent would not agree. Fawsett stated that Respondent did not want dues money coming out the employees' checks because it would make their employees' earnings appear to be less than they were while providing no immediate tangible benefits to the employees.[12] Fawsett told the Union that in view of the number of employees and the proximity of the Union's office to the plant it would be a simple matter for the Union to collect its own dues. These positions were reasserted in the September 30 letter from Eby to Totzke.

Respondent presently deducts insurance and credit union payments from the employees' pay.

1. Contract term

When the Union presented its original proposal, Fawsett indicated that the Company would prefer a 1-year contract term. Totzke responded affirmatively. However, neither party initialed the agreement so as to signify agreement. The matter was not discussed again during the course of the negotiations. Eby's September 30 letter states: "We would prefer a three year duration. We are aware that most of your contracts in the area are for 3 years, with wages provided for without the necessity of reopeners. Our wage proposal, in essence, is a sort of reopener which comes up every 6 months."

12. Wages

Since its inception in about 1957, it has been Respondent's practice to grant wage increases solely on the basis of merit, not to grant across-the-board increases. Twice annually, its owners met with the general manager and the immediate supervisors to review each employee in regard to productivity, work skill, improvement, and attendance, to determine what, if any, raises should be granted.

On December 16, 1980, Eby wrote the Union, describing Respondent's wage increase practice. In that letter, he noted that the merit wage increases were always granted in January and "usually at mid-year as well" and stated that this was a matter which required immediate action in order that it be "put into effect in January, 1981, without regard to whether a full agreement is reached by that time." He proposed that Respondent follow its usual practice in connection with the granting of the increases and offered the Union "the opportunity to bargain on and discuss the above matters and their affect on employees in the unit, in full, at an early date of your choice." He proposed meeting immediately.[13] The Union, not wishing to prevent employees from receiving wage increases, and assuming that it would have no meaningful role in the merit increase reviews, declined to participate and authorized Respondent to proceed.

The Union's initial proposal, on January 12, contained general wage increase language which called for certain minimum wages while permitting Respondent to grant wage increases above those minimums "for superior craftsmenship." On January 14, the Union submitted its proposed wage schedule wherein it proposed wage rates ranging from $4.35 per hour for production line machine operators and shipping helpers and $6 per hour for the mechanic's helpers to $339 per week for the shuttle driver. It also proposed a wage increase of 60 cents per hour (10 to about 15 percent) after 6 months. Additional raises were to be granted for longevity.

Respondent's wage proposal, presented about January 22, was as follows:

[10] Totzke testified that Respondent had threatened to cease any existing practice of granting vacation pay to employees who terminated prior to earning their complete vacation. The record is ambiguous as to the extent that any such practice existed and therefore fails to sustain the General Counsel's contention that a reduction in benefits had been threatened.

[11] It appears that Respondent had a practice of sending employees home after a minimum of 4 hours if the necessary work had been completed.

[12] Totzke contended that Fawsett had said that the Company was not going to make payroll deductions in order to support the Union. Fawsett acknowledged saying that the Union wanted checkoff as a benefit to itself. He denied rejecting it because the Company "did not want to support the Union."

[13] The letter also indicated the need to grant wage increases to assure compliance with the increase in the Federal minimum wage to $3.35 per hour, which had become effective on January 1, 1981.

Wages

> The parties agree that Company shall continue its existing practice of granting wage increases on the basis of merit. Wages of employees are to be reviewed on a semi-annual basis, at the approximate beginning and at approximately mid-year of each calendar year, commencing at mid-year, 1981. The Union's representative will be notified prior to such review, and will be given the opportunity to participate in the said review at the Company's premises. Final decisions as to increases, if any, shall be made by the Company. In no event shall an employee be reduced below his or her hourly rate existing upon the date of execution of this contract. Wages presently in effect are as set forth on the attached Schedule A. The Company agrees to update Schedule A from time to time in accordance with updating of the seniority list.

According to Totzke, Fawsett did not further define the extent of the Union's participation in the semiannual merit reviews. According to Fawsett, the union representatives did not inquire as to how extensive their participation would be. Totzke understood that Respondent intended that there should be separate negotiations in regard to the wage increase for each employee.[14] In regard to the Union's proposed wage rates, Fawsett stated that he had reviewed copies of the Union's contracts with various motels in the area and felt that Respondent's wages, paid to untrained, relatively unskilled workers, similar to certain classifications in the Union's contracts, were better than what the Union had negotiated elsewhere. The Union protested that the contracts on which Fawsett was relying were not indicative of the actual wages paid. They did not respond to Fawsett's request that he be shown the actual wages rate. Fawsett also stated that Respondent's wages were as good as or better than Respondent's competitors in the sandwich-making business, all of whom were unrepresented. There was no significant discussion of wages thereafter until September 14. Although it was requested to do so several times, Respondent never presented a wage proposal different from that which it had initially made.

Around mid-year, Respondent once again notified the Union of its intention to conduct performance appraisals and grant merit increases. The Union declined Respondent's invitation to participate and indicated that it did not object to the granting of such increases at that time.

On September 14, the Union's counsel, Pilacek, attended the bargaining session and again asked why the Company had made no wage proposal or offered a wage schedule broken down by classification. Respondent said they had made a wage proposal and again explained their practice of evaluating employees and granting merit wages increases. Pilacek accused Respondent of merely going through the motions of collective bargaining and requested that Company have a wage proposal to present to the Union at the next meeting.

There was, however, no next meeting. Respondent's letter of September 30 sets forth the following as its position on wages; this position was unchanged as of at least November 3:

> First, we believe the wages being paid by us to our employees are not only fair, but generous, in view of wages being paid to employees by our competitors in the state. Further, our wages compare favorably with wages being paid by various area employers whose employees are represented by your local union. We have not, during the years we have been in Orlando, received complaints about our wage structure, or about our manner of determining wages. As you know, in June of this year we gave wage increases after discussing the matter first with you and receiving your consent that it would be done. Our proposal regarding wages is that we continue to give increases based upon merit, with your organization having full opportunity to participate in discussions leading to each decision. The Company has a twenty-four year history of granting pay increases in this manner. It does not wish to deviate from this procedure other than to, of course, give your organization an opportunity to be notified of prospective increases and to bargain with respect to such matters.

In December, Respondent once again notified the Union of its intention to evaluate employees and grant merit wage increases. The Union did not object and declined to participate.

When asked whether Respondent ever offered to bargain with the Union over wage increase factors other than merit, General Manager Eby testified: "No, they knew how we did it. We gave them the opportunity to come out and they could sit there with us and go over it in a bargaining method upon each person." Again, when asked whether Respondent intended "to allow the Union to discuss . . . factors . . . other than merit such as seniority," he replied, "well, they knew that it was merit. They knew that they could come out there and sit down and discuss each individual person with us. Now, if they wanted to discuss anything else, I'm open to anything. We have been for 24 years, this company 25, I guess it is now, this is the way that they have always done it. We have never had anybody complain about it. It seems to be working out real nice."

Analysis and Conclusions

The basic parameters of the bargaining obligation have been stated many times. In its most recent distillation of these principles, *Chevron Chemical Company*, 261 NLRB 44, 46 (1982), the Board stated:

> . . . in ascertaining whether the duty to bargain in good faith has been complied with, it must be remembered that Section 8(d) does not "compel either party to agree to a proposal or require the making of a concession. . . ." Thus, the Board does not, "either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive

[14] This understanding appears to be borne out by Respondent's letter of September 30.

> terms of collective bargaining agreements." *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395, 404 (1952).[6] On the other hand, as stated by the Supreme Court, "[T]he Board has been afforded flexibility to determine . . . whether a party's conduct at the bargaining table evidences a real desire to come into agreement . . . . And specifically we do not mean to question in any way the Board's powers to determine the latter question, drawing inferences from the conduct of the parties as a whole." *N.L.R.B.* v. *Insurance Agents' International Union, AFL-CIO* [*Prudential Insurance Co.*], 361 U.S. 477, 498 (1960).

[6] But see fn. 10, *infra.*

The Supreme Court had also stated, in *N.L.R.B.* v. *Insurance Agents' Union, supra* at 485:

> Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of "take it or leave it"; it presupposes a desire to reach ultimte agreement, to enter into a collective bargaining agreement.

The parties are duty-bound "to enter into discussion with an open and fair mind, and a sincere purpose to find a basis of agreement" (*N.L.R.B.* v. *Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960)), to "approach the bargaining table with an open mind and purpose to reach an agreement consistent with the respective rights of the parties." *Majure* v. *N.L.R.B.*, 198 F.2d 735, 739 (5th Cir. 1952) "The essential thing," as the Supreme Court in the *Insurance Agents* case quoted with approval from the Board's first annual report, "is . . . the serious intent to adjust differences and to reach an acceptable common ground."

The resolution of surface bargaining allegations, as has often been stated, never presents an easy issue. The problems are complex, "no two cases are alike." and "none can be determinative precedent for another, as good faith bargaining 'can have meaning only in its application to the particular facts of a particular case'" *Borg-Warner Controls, a Division of Borg-Warner Corporation*, 198 NLRB 726, 729-730 (1972), quoting from *N.L.R.B.* v. *American National Insurance Co., supra* at 410.

As previously noted, the General Counsel's contention that Respondent engaged in surface bargaining rests almost entirely upon the terms of Respondent's bargaining proposals.[15] As stated in its brief, "Respondent contends that the controlling law in this country is that in determining whether the conduct of an employer in bargaining constitutes bad faith, the Board and courts cannot, as a matter of law, rely exclusively on the language and content of contract proposals." Respondent cites, in support thereof, *Pittsburgh-Des Moines Corporation* v. *N.L.R.B.*, 663 F.2d 956 (9th Cir. 1981); *Pease Company* v. *N.L.R.B.*, 666 F.2d 1044 (6th Cir. 1981); and *Gulf States Manufacturers, Inc.* v. *N.L.R.B.*, 579 F.2d 1298 (5th Cir. 1978). There are, to be sure, restraints upon the Board's authority to find bad faith solely upon examination of a respondent's bargaining proposals, but such restraints are not absolute. In *N.L.R.B.* v. *Wright Motors, Inc.*, 603 F.2d 604, 609-610 (7th Cir. 1979), the court stated:

> Sometimes, especially if the parties are sophisticated, the only indicia of bad faith may be the proposals advanced and adhered to. *N.L.R.B.* v. *Holmes Tuttle Broadway Ford, Inc.*, 465 F.2d 717, 719 (9th Cir. 1972); *Vanderbilt Products, Inc.* v. *N.L.R.B.*, 297 F.2d 833 (2d Cir. 1961); *N.L.R.B.* v. *Reed & Prince Manufacturing Co.*, 205 F.2d 131, 134-135, 139 (1st Cir. 1953), certiorari denied, 346 U.S. 887 . . . . The fact that it may be difficult to distinguish bad faith bargaining from hard bargaining cannot excuse our obligation to do so.

The court in *Wright Motors*, enforcing the Board's Order (237 NLRB 570 (1968)), found "that the combination of unrealistically harsh positions adhered to by the company for six months and the avoidance of bargaining on key issues provides substantial support" for the conclusion of surface bargaining reached by the Administrative Law Judge and affirmed by the Board. The court's decision in *Wright Motors* was cited with approval in *Pease Company* for the proposition that "unusually harsh and unreasonable proposals may support a finding of bad faith bargaining" and *Pease Company* was cited by the Board for that same proposition in *Chevron Chemical, supra*, fn. 10. See also *N.L.R.B.* v. *Johnson Manufacturing Company of Lubbock*, 458 F.2d 453 (5th Cir. 1972), where the court, upon the Board's petition for civil contempt, found by the requisite standard of clear and convincing evidence that an employer's proposals and bargaining positions precisely paralleled the surface bargaining which the court had condemned in its original enforcement order (unpublished). *American Parts System*, 232 NLRB 41 (1977), is an additional example of a surface bargaining violation premised solely upon an employer's bargaining positions and proposals.

Thus, the question here is whether the evidence adduced by the General Counsel, consisting primarily of Respondent's bargaining proposals and positions, but also viewed in the light of statements indicative of Respondent's attitude toward collective bargaining, is sufficient to establish that Respondent entered into bargaining with no real intention of concluding a final and binding collective-bargaining agreement. I must conclude that it is.

Of principal importance leading to the foregoing conclusions is the wage proposal to which Respondent adhered throughout negotiations.[16] Pursuant to that proposals, A-1 would not consider any modification in the basic wage rates paid to its employees and would permit the Union only to participate in a burdensome one-by-one review of the employees for merit. Moreover, the Union's participation would be limited to observation, suggestion, or prayerful entreaty since, pursuant to the

[15] The General Counsel also points to certain statements made at the bargaining table as indicative of bad faith.

[16] In reaching this conclusion, I deem it immaterial whether A-1's wages were generous or penurious or whether the Union's demands were modest or outrageous.

Respondent's wage proposal and its concurrently proposed management rights and no-strike clauses, Respondent would retain the exclusive right to evaluate employees, its decisions on wage rates would be final, it would have the unilateral right to terminate or modify bonus or work incentive plans, and the Union would be precluded from striking to enforce its wage demands. Respondent contends, on brief, that even assuming that it insisted on complete control over wages, no violation may be found because "it is common knowledge that any final decision on amounts of compensation rests exclusively with the employer." Respondent would thus ignore its statutory obligation to *negotiate* with its employees representatives and would further ignore or preclude the Union's statutory right to engage in meaningful negotiations, including its right to exert economic pressure in support of its demands. Respondent's attitude toward bargaining over wages is further revealed in the testimony of Eby. When asked whether Respondent had ever offered to bargain over wage factors other than merit, he replied, "No, they knew how we did it." His additional statement, to the effect that this was how it had been done for 25 years without complaint from the employees, tends to indicate a mind closed to the possibility of change, notwithstanding his self-serving statement that if the Union "wanted to discuss anything else, I'm open to anything," and further ignores the fact that a majority of the unit employees voted for union representation, an effective way for employees to register discontent with the way things were being done.

I conclude from all of the foregoing that, in essence, A-1 has refused to negotiate in good faith with the Union in regard to wages, a mandatory subject of bargaining. *Wright Motors, supra.*

Similarly, examination of Respondent's other proposals, particularly as they interrelate, reveals that Respondent was insisting in retaining to itself total control over virtually every significant aspect of the employment relationship. Thus, under its proposals, Respondent sought to retain exclusive and unbridled control over discipline and discharge and both layoff and recall; moreover, discipline/discharge matters were implicitly excluded from the grievance and arbitration procedure[17] and layoff/recall matters were expressly excluded.[18]

Respondent also insisted that it retain the right to unilaterally change the employees' working conditions generally, and more specifically in regard to, *inter alia,* the setting or establishment of work rules and regulations, the making and implementation of timestudies, subcontracting, or otherwise transferring the work of unit employees to others and the establishment of rules and regulations pertaining to safety. In none of these areas would the Union have any voice. Thus, notwithstanding Fawsett's repeated oral assurances when discussing the proposed exclusiveness clause, that Respondent was not attempting to preclude its obligation to notify and bargain with the Union concerning changes in terms and conditions of employment, Respondent's management-rights proposal would even deny the Union notice that such actions were going to be taken so that it might endeavor to persuade Respondent to follow a different course of action. Even Respondent's past practices would not limit the extent to which it would be authorized to exercise "complete freedom." Moreover, even when the Employer's conduct constituted a violation of law, such as under the NLRA or various antidiscrimination statutes, the Union would be precluded from either grieving the violation or seeking to remedy it by the exercise of economic power, a strike.

Based upon all of the foregoing, I am convinced that throughout the negotiations, Respondent maintained a state of mind inconsistent with a willingness to reach genuine agreement with the Union and was engaging in "surface bargaining" in violation of Section 8(a)(5) and (1) of the Act. As has previously been stated by the Board in similar situations, "the company's proposed contract in effect 'would strip the Union of any effective method of representing its members . . . further excluding it from any participation in decisions affecting important conditions of employment . . . thus exposing the company's bad faith.'" *American Parts System,* 232 NLRB 41, 47–48 (1977), quoting from *San Isabel Electric Services, Inc.*, 225 NLRB 1073, 1080 (1976). In *San Isabel,* as here, the employer's management-rights clause would have precluded the union's participation in such significant areas as the establishment of work and safety rules and the Board referred to the employer's insistence upon such a management-rights clause as a "smokescreen . . . to conceal an effort to exclude the Union" from the participation to which it was statutorily entitled.

The Board's decision in *Hospitality Motor Inn, Inc.*, 249 NLRB 1036, 1040 (1980), enfd. 667 F.2d 562 (6th Cir. 1982), is of particular relevance to the instant discussion. There, the employer insisted upon a management-rights clause not nearly as broad as A-1 had proposed, under which it would retain:

> . . . the *sole right*, to transfer, suspend, and discharge employees for any reason; to make and enforce rules; to determine the prices of products and services sold and furnished to employees; to determine volume and rate of production; to redetermine the number and location of its operations and to discontinue operations; to subcontract work; and to establish new job classifications and rates of pay. In addition to reserving these and other enumerated rights, the management-rights proposal states that the Company "retains all rights not otherwise specifically covered by this Agreement."

Additionally, in terms similar to those present in the instant case, that employer objected to the imposition of a "just causes" tandard for discharge and to the arbitration of discharges, opposed, for "philosophical" reasons, dues

[17] Fawsett's assurances that a "grievously wrong discharge" would impliedly to be subject to arbitration appears to be without any warrant in law or practice.

[18] I note, additionally, Eby's statement rejecting the Union's argument that subjecting disciplinary matters to the grievance procedure would enable management to better know how its supervisors were treating employees. His reference to "an open door policy" and to employee rights to come and talk to him is an implicit negation of the Union's statutory role in such matters. Moreover, Fawsett's claim that Respondent had never received employee complaints about discipline ignores the implications of the affirmative vote for representation.

checkoff,[19] and rejected the Union's proposed antidiscrimination clause. The Board and the court affirmed the Administrative Law Judge's conclusions that: the assertion of "philosophical" objections does not satisfy the statutory obligation to bargain about union security; "that one is impelled to question the good faith of a bargaining position that antidiscrimination provisions are unnecessary because the 'law' already prohibits such conduct"; and that the "totality of its conduct—including, *inter alia*, its positions as to union-security, dues checkoff, management-rights, individual contracts, and no-discrimination provisions—also establishes that Respondent engaged in bargaining without a good-faith intent and effort to 'resolve differences and reach a common ground'" in violation of Section 8(a)(5) and (1) of the Act.

While it would be virtually impossible to find one case involving allegations of surface bargaining to be "on all fours" with another, *Wright Motors, supra*, comes remarkably close. Therein, the Administrative Law Judge, whose rulings, findings, and conclusions were affirmed by the Board, found that:

> Some of [the employer's] proposals would have put the employees in a far worse position with the Union than without it. Others would have so damaged the Union's ability to function as the employees' bargaining representative that [the employer's representative] could not seriously have expected that they could result, in serious and meaningful collective bargaining. [237 NLRB at 575–576.]

Among the "more flagrant ones" pointed to were: "a lengthy management rights clause, not subject to the grievance procedure which gave the Company exclusive control over hours, work rules, and production, and authorized the Company to subcontract, curtail or shut down its business completely without regard to the effect on employees";[20] and "extraordinary no strike-no lockout clause";[21] an article which provided for only limited and permissive arbitration; and left the hourly wage rates and promotions to be set at the Company's sole discretion. The Administrative Law Judge and the Board concluded that respondent had "embarked upon a plan or strategy to frustrate and insure the failure of the collective-bargaining process by . . . engaging in surface bargaining with no sincere intention of reaching agreement" in violation of Section 8(a)(5) and (1). The Administrative Law Judge and the Board further found that Respondent had violated Section 8(a)(5) by delaying meetings and by delaying submission of data to the union. The circuit court rejected the Board's findings of violation based on the delay of meetings and the delay in the furnishing of information and enforced the Order based entirely upon the surface bargaining conclusion. Pointing out that where (as here) sophisticated parties are involved, "the only indicia of bad faith may be the proposals advanced and adhered to," the court stated at 609–610:

> We share the concern of the ALJ and the courts in *Gulf States Manufacturers, Inc.* v. *N.L.R.B., supra*, and *N.L.R.B.* v. *Tomco Communications, Inc., supra*, that neither the Board nor the courts should sit in judgment on the substantive terms offered by parties negotiating in good faith. It is equally clear, however, that the Union has an enforceable right to good faith bargaining.

The court held that "the combination of unrealistically harsh positions adhered to by the company for six months and the avoidance of bargaining on key economic issues provides substantial support for the ALJ's conclusion."[22]

In the instant case, as in *Wright Motors*, Respondent's proposals, if accepted, would have left the Union and the employees with substantially less rights and protection than they would have had if they had relied solely upon the certification. Without agreeing to Respondent's proposal, the Union had the right to prior notice and bargaining concerning all changes or modifications in terms and conditions of employment and it retained the right to strike in protest of such actions and in protest of conduct violative of the employees' other legal rights. Acceptance of Respondent's proposal would have denied the Union even of the right to notice concerning such fundamental matters as the elimination of some or all of the unit jobs. Could sophisticated counsel have any reasonable expectation of agreement to proposals which would

[19] Respondent's objections to checkoff are in the same vein. See also *American Steel Building Company, Inc.*, 208 NLRB 900 (1974).

[20] Here, after soliciting the Union's objection to its language excluding management rights from the grievance and arbitration machinery, Respondent dropped that language and replaced its management-rights clause proposal with another lengthier and more detailed proposal which made access to the grievance machinery essentially illusory.

[21] *Wright Motors* proposal required that union fines be imposed on striking employees, imposed personal and institutional liability on the union and its officers, set both liquidated and actual damages, and limited both the union's legal rights and the arbitrator's authority. Respondent's proposal was no less extraordinary; it did not preclude lockouts, it precluded strikes in regard to actual violations of law (which were also excluded from the grievance machinery) and it subjected striking employees to immediate discharge without recourse to the grievance procedure. See *San Isabel Electric Service, supra* at 1079, fn. 7, and cases cited therein, where the Board stated:

> We have consistently found bad-faith bargaining in cases in which an employer has insisted on a broad management rights clause and a no-strike clause during negotiations, while, at the same time, refusing to agree to an effective grievance and arbitration procedure.

[22] The Seventh Circuit distinguished the decisions of the Fifth Circuit in *Gulf States* and the Ninth Circuit in *Tomco* on grounds entirely applicable to the instant case. Thus, it pointed out that in *Gulf States* the employer had established that its proposals were not so outrageous that they could not have been made in good faith by demonstrating numerous agreements incorporating substantially similar provisions. No such demonstration was made in the instant case. The Seventh Circuit further pointed out that in *Wright Motors*, as in the instant case, the record did not reveal bona fide concessions on substantial issues such as might refute an accusation of bad faith and show that the employer was not merely being intransigent. The "concessions" or agreements made by the Employer in the instant case closely parallel those of the employer in *Wright Motors* and are distinguishable from those made by the employer in *Gulf States*. In regard to *Tomco*, the *Wright Motors* court pointed out that the Administrative Law Judge had found bargaining in good faith up to the point when the parties reached impasse on wages and the court found no substantial evidence upon which the Board could have reversed the Administrative Law Judge's findings. It was noted that, even then, the *Tomco* court had cautioned that a bargaining proposal could contain terms so hostile as to evidence bad faith.

delete those rights, particularly when there was not even the offer to maintain the status quo in regard to existing working conditions? I do not believe so and I must therefore conclude that Respondent intended "to frustrate and insure the failure of the collective-bargaining process." *Wright Motors, supra.* See also *N.L.R.B.* v. *Johnson Manufacturing Company of Lubbock, supra,* and *Majure* v. *N.L.R.B., supra; American Steel Building Co., supra.*[23]

The General Counsel further contends that Respondent's bad faith is established by its proposal of articles which would reduce employee benefits.[24].

The evidence establishes that, in the course of discussions concerning leaves of absences, Respondent indicated its intention to make pregnancy leaves mandatory, to deny light duty to pregnant or injured employees, and to deny such employees any assurance of recall at the conclusion of their leaves of absences, all contrary to past practice. In the leaves of absence article to which the parties ultimately agreed, there was language impliedly entitling laid-off employees to reinstatement provided that they met certain conditions. Nothing further was said about light duty or the mandatory nature of pregnancy leaves. The evidence further establishes that Respondent initially proposed a reduction in the length of the unpaid lunch period and the paid afternoon rest break. The Employer's ultimate proposal was to maintain the status quo. No agreement was reached.

The foregoing, in and of themselves, do not rise to the level of a refusal to bargain. They do, however, shed some light on Respondent's motivation and I have so considered them.

The General Counsel further contends that Respondent evidenced its bad faith by reneging on an agreement as to the contract's term. This contention is rejected. The matter was little discussed and the record is insufficient to establish that agreement on this issue had ever been reached.

[23] Indeed, it may seriously be questioned whether a proposal wherein one party retains the right to unilaterally change virtually every significant aspect of the working relationship during that "contract's" term, while the other party is rendered helpless to oppose such actions, is a proposal for a *collective-bargaining agreement.* See *Applachian Shale Products Co.,* 121 NLRB 1160, 1163–64 (1958), wherein the Board, in restating its contract bar rule, stated:

> . . . to serve as a bar to a new representation petition, a contract must contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship.

The Board pointed out that:

> . . . real stability in industrial relations can only be achieved where the contract undertakes to chart with adequate precision the course of the bargaining relationship, and the parties can look to the actual terms and conditions of their contract for guidance in their day-to-day problems.

These requirements have been consistently adhered to. *Stur-Dee Health Products, Inc.,* 248 NLRB 1100 (1980); *J. P. Sand and Gravel Co.,* 222 NLRB 83 (1976); *Raymond's Inc.,* 161 NLRB 838 (1966).

[24] I have previously found that the evidence in regard to Respondent's practice regarding payment for accrued vacation benefits was too ambiguous to support a finding of a violation. This contention warrants no further consideration.

Conclusions of Law

1. The Union is the certified bargaining agent for Respondent's employees in the following appropriate unit:

> All employees employed as sandwich production workers, salad production workers, maintenance, custodial, sanitary workers, pie shop workers, shuttle drivers and shipping helpers; but excluding office clerical employees, all other truckdrivers, guards and supervisors as defined in the Act.

2. Respondent violated Section 8(a)(5) and (1) of the Act by bargaining with the Union in bad faith with no intention of entering into any final or binding collective-bargaining agreement.

3. The unfair labor practice found herein affects commerce within the meaning of Section 2(6) and (7) of the Act.

The Remedy

Having found that Respondent engaged in the unfair labor practice set forth above, I recommend that it cease and desist from such conduct or like or related conduct and take affirmative action to effectuate the policies of the Act. I shall also recommend that Respondent be ordered to bargain collectively in good faith, upon request, with the Union as the exclusive bargaining representative of its employees in the above unit; in the event that an understanding is reached, to embody such understanding in a signed agreement; and to post the attached notice.

In order to ensure that the employees will be accorded the statutorily prescribed services of their elected bargaining agent for the period provided by law, I shall recommend that the initial year of certification begin on the date that Respondent commences to bargain in good faith with the Union as the bargaining representative in the appropriate unit. *Southern Paper Box Company,* 193 NLRB 881, 883 (1971).

Upon the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[25]

The Respondent, A-1 King Size Sandwiches Incorporated, Orlando, Florida, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with Hotel, Motel, Restaurant Employees & Bartenders Union, Local 737, by bargaining with the Union in bad faith with no intention of entering into any final or binding collective-bargaining agreement. The appropriate unit is:

[25] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

All employees employed as sandwich production workers, salad production workers, maintenance, custodial, sanitary workers, pie shop workers, shuttle drivers and shipping helpers; but excluding office clerical employees, all other truckdrivers, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively and in good faith concerning rates of pay, hours of employment, and other terms and conditions of employment with the above-named Union as the exclusive bargaining representative of its employees in the above-described unit, and embody in a signed agreement any understanding reached. The initial year of the Union's certification as the exclusive bargaining representative of the employees in the above-designated unit will begin on the date Respondent commences bargaining in good faith with the Union as such representative.

(b) Post at its establishment in Orlando, Florida, copies of the attached notice marked "Appendix B."[26] Copies of said notice, on forms provided by the Regional Director for Region 12, after being duly signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 12, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

[26] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENIDX A

ARTICLE

MANAGEMENT RIGHTS

1. *Reservation of Rights.* The Company exclusively reserves all rights, powers and authority customarily exercised by management, except as expressly limited or modified by clear, specific provisions of this agreement.

2. *Prior Rights.* Before the Union became the representative of the employees covered by this agreement, the Company had the right to deal with its employees with complete freedom, except as its rights were bounded and limited by the general laws. By this agreement, the Company and the Union have agreed to certain limitations on those rights. However, it is the intention of the parties hereto that the Company retain, and the Company does retain, each and every right, power and privilege that it ever had enjoyed, whether exercised or not, except insofar as it has, by express and specific terms of this agreement, agreed to limitations.

3. It is agreed that the Company shall have authority to determine and from time to time redetermine, and direct the policies, mode and methods of performing all its work of any sort, without any interference in the management and conduct of the Company's business on the part of the Union or any of its representatives. Except as expressly limited by a specific provision of this agreement, the Company shall continue to have the exclusive right to take any action it deems necessary or appropriate in the management of the Company and the direction of its work force. All inherent and common law management rights and functions which the Company has not expressly modified or restricted by a specific provision of this agreement are retained and vested exclusively in the Company. Such rights exclusively reserved to the Company shall include, but are not limited to, the right to determine the qualifications for and to select its employees; to determine the size and composition of its working forces; to determine work schedules and all methods of production; to assign overtime work; to determine the number and types of equipment, processes, materials, products and supplies to be used, operated or distributed; to hire, retire, promote, demote, evaluate, transfer, suspend, assign, direct, lay off and recall employees; to reward or to reprimand, discharge or other wise discipline employees; to maintain efficiency of employees; to determine job content and minimum training qualifications for job classifications and the amounts and types of work to be performed by employees; to establish and change working rules and regulations; to engage in experimental and developmental projects; to establish new jobs and to abolish or change existing jobs; to increase or decrease the number of jobs or employees; to determine whether and to what extent the work required in its operations shall be performed by employees covered by this agreement; to use supervisors or other nonunit employees to perform work of the kind performed by employees of the unit; to determine the assignment of work; to schedule the hours and days to be worked on each job an each shift; to discontinue, transfer, or assign all or any part of its functions, services, production or other operations; to open new facilities and transfer its operations or any part thereof to new facilities; to subcontract any part of the Company's work; to make time studies of work loads, job assignments, methods of operation and efficiency from time to time and to make changes based on said studies; to expand, reduce, alter, combine, transfer, assign, cease or create any job, job classification, department or operation for business purposes; to institute, modify or terminate any bonus or work incentive plan; to control and regulate or discontinue the use of supplies, machinery, equipment, vehicles and other property owned, used, possessed or leased by the Company; to make or change rules, policies and practices not in conflict with the provisions of this agreement; to alter or vary past practices; to introduce new, different or improved methods, means, processes, maintenance, service and operations; to make rules and regula-

tions for the purpose of efficiency, safe practices and discipline; and otherwise generally to manage the business, direct the work force, and establish terms and conditions of employment, except as expressly modified or restricted by a specific provision of this agreement. The Company's failure to exercise any function or right hereby reserved to it, or its exercising any function or right in a particular way, shall not be deemed a waiver of its rights to exercise such function or right, nor preclude the Company from exercising the same in some other way not in conflict with the express provisions of this agreement. The Union agrees that the Company may exercise all of the above without advising the Union of any such proposed action, change or modifications; nor shall the Company be required to negotiate over the decision or its effect on the employees, except as altered by this agreement.

4. In interpreting this agreement there shall be absolute and complete regard for the rights, responsibilities and prerogatives of management. This agreement shall be so construed that there shall be no interference with such rights, responsibilities and prerogatives except as may be expressly provided in this agreement. Past practices of the Company shall not be considered for the purpose of limiting the rights, responsibilities or prerogatives of management, nor for the purpose of enlarging upon the specific and express limitations on management which are contained in this agreement.